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### Weathering the Murphy storm

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Weathering the 'Murphy' Storm: IP Domestic Litigation and Industrial Consolidation as pragmatic responses to the Court of Justice's decision?

## 1. Introduction

The *Murphy* judgment, decided in 2011, has had a significant impact on the way in which the rules on the single market affect the exercise of exclusive broadcasting rights within the European Union ('EU'). Since the Court of Justice of the European Union ('CJEU') de facto outlawed the "territorial exclusivity" hitherto granted to licensees of sports broadcasting rights across the EU, the judgment was expected to have significant consequences on the industrial and commercial strategies of major broadcasters. This article explores the impact of *Murphy* on the dynamics of this particular sector of the audiovisual media industry and focuses on the actions of Sky plc (formerly BSkyB) who owns the right to broadcast live matches involving several major English Premier League clubs. It will be suggested that through its merger, post-*Murphy*, with its German and Italian arms, BSkyB appeared to act, albeit in the background, to protect its position in the industry and gain a foothold in very lucrative and still partly untapped pan-European markets.

This contribution will also explore the recent IP litigation initiated by the Football Association Premier League (FAPL) in English and Scottish courts designed to rein in landlords and tenants seeking to rely on the free movement rights confirmed in the 2011 judgment. It will be queried to what extent these various strategies can be read as an attempt by rights holders to "limit the damage" to the value of their investments in expensive media content caused by *Murphy*.

The article will argue that whether the choice of BSkyB to rely on a merger with its Italian and German counterparts, on the one hand, and recourse to copyright litigation in national courts by licensors or sports broadcasting rights, on the other hand, may be constructed as a "response" to the challenges that the *Murphy* preliminary ruling posed remains unclear. It will be concluded that as the EU market for the provision of audiovisual media services continues to evolve, both as regards the nature of the content being communicated and of the means through which this is transmitted, the extent to which existing licensing practices can be attuned to the need to safeguard the rights of licensors and licensees while at the same time assuring the good functioning of the internal market remains an open question. Nonetheless, as the industry players look for novel, more efficient ways of supplying their content, on the one hand, and the EU authorities pursue the goal of a EU-wide digital single market, on the other hand, significant policy changes may be afoot to reconcile the inevitable territorial segmentation characterising this industry with the demands of a sector where industrial conglomerates seem to have become a familiar feature.

## 2. A brief overview of the CJEU *Murphy* decision

There has been extensive commentary on the preliminary ruling in *Murphy* and it is not the purpose of this article to condense the ebb and flow of this debate.<sup>1</sup> It may nonetheless be helpful to set out the CJEU's findings and conclusions. The case arose from a preliminary reference made by the English High Court in the course of criminal proceedings initiated by the Football Association Premier League (FAPL) against Mrs Karen Murphy, a pub landlady. She had been accused of using an "unauthorised device" (namely a decoder card purchased in Greece from NOVA, the broadcaster licensed to

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<sup>1</sup> See e.g. Robertson, "Murphy's law", in Buttigieg (Ed), *Rights and Remedies in a liberalised and competitive internal market*, 2012: Malta, p. 197; Pibworth, "The Murphy judgment: not quite full time for football broadcasting rights", (2012) 8(2) *CompLRev* 209; Doukas, "The Sky is not the (only) limit: sports broadcasting without frontiers and the Court of Justice", (2012) 37(5) *ELRev* 605; Margoni, "The protection of sports events in the EU", (2016) 47(4) *IIC* 386.

broadcast images of the FALP games in Greece in regime of exclusivity) to receive the signal which was being beamed from Greece and which could be received also in the UK in order to screen these events in her commercial premises.<sup>2</sup>

Civil proceedings were also ongoing, in parallel to the criminal ones: BskyB claimed that although the decoding device was purchased in Greece from the lawful licensee of FAPL rights, it had been used unlawfully since its holder had relied on it to receive and transmit satellite images outside the territory for which NOVA was authorised to sell it.<sup>3</sup> In their defence, the respondents alleged that the territorial limits placed by the licensor on the right of cardholders to receive the broadcasts in a different member states conflicted with the rules on free movement of services and genuine competition enshrined in the TFEU.<sup>4</sup> It was also argued that the licensing agreements, in as much as they had been assisted by an absolute territorial protection clause, were incompatible with Article 101(1) TFEU by reason of their 'object', in that they led to the "artificial maintenance" of national boundaries within the internal market.<sup>5</sup>

The referring courts raised four distinct questions: was the use of the "Greek" decoder card to capture and relay football matches within the UK constituted unlawful use of an "unauthorised device"?<sup>6</sup> Could the holder of copyrighted material included in an unauthorised broadcast enforce its IP rights in the civil proceedings? The domestic judge also queried whether the FAPL and its licensees in the UK could rely on the exclusivity clause contained in the licensing agreements in order to prevent the unauthorised broadcast without infringing the EU Treaty rules on the free movement of services and whether the same clause contravened Article 101(1) TFEU.<sup>7</sup>

The CJEU rejected the claim that the use of a "foreign" decoder card in a member state other than the one of purchase had been unlawful, on the ground that the decoding device had neither been "(...)'designed' or 'adapted' to give access" to those services "in an intelligible form without the authorisation of the service provider"<sup>8</sup> nor been "manipulated" to allow for the reception of the services in issue.<sup>9</sup> The CJEU then moved to consider whether domestic rules preventing decoder cards from being used outwith the state from which they had been supplied and purchased were compatible with the internal market principles in the TFEU. Starting with the rules on free movement of services, it was held that since such a limitation resulted in users being unable to receive broadcasting services from elsewhere in the Union, it restricted the right of the device users to receive services, in accordance with Article 56 TFEU<sup>10</sup> and could only be justified by "overriding reasons in the public interest", subject to requirements of "suitability" and of "proportionality".<sup>11</sup>

Thereafter, the Court considered to what extent the protection of "valuable material" such as sports broadcasts could be used to justify restricting the right to free movement of services.<sup>12</sup> It observed that such limitations could only be justified if they were limited to what was necessary to protect the "specific subject-matter" of the rights in question, namely the right of the holder to

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<sup>2</sup> See Robertson, cit. (fn. 1), pp. 203-205.

<sup>3</sup> Ibid.; see also p. 206.

<sup>4</sup> Id., p. 207; see also *FAPL v NetMed and others*, [2008] EWHC 1411 (Ch), para. 14; see also para. 13.

<sup>5</sup> Id., para. 55-56; see also para. 39-40.

<sup>6</sup> See Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, [1998] OJ L320/54.

<sup>7</sup> *Murphy v Media Protection Services Ltd*, [2008] EWHC 1666 (admin), para. 67 and ensuing Appendix; see also *FAPL v NetMed*, cit. (fn. 4), para. 369-375.

<sup>8</sup> Joined Cases C-403/98 and 429/98, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, [2011] ECR I-9083, para. 64.

<sup>9</sup> Id., para. 66.

<sup>10</sup> Id., para.85-86.

<sup>11</sup> Id., para. 93-95.

<sup>12</sup> Id., para. 96-97; see also para. 102-104.

“exploit commercially” that subject matter, by making it available to others upon payment of a fee<sup>13</sup> that was “appropriate (...) for each use of the protected subject-matter”.<sup>14</sup> The Court observed that such remuneration could be quantified in light of such factors as the size of the audience, actual as well as potential, the language in which the content was broadcast and the fact that the programmes in issue could be viewed in more than one Member State.<sup>15</sup>

As to the question of whether different prices could be charged in different linguistic and national areas across the internal market by the appointed licensees in each zone, the CJEU observed that at least in principle, this remuneration could be calculated by taking into account the “peculiar character” of the content being broadcast, which in turn could justify subjecting the license to a territorial exclusivity clause.<sup>16</sup> However, it took the view that the “language-dependent” and hence “territorial” nature of the content could not justify allowing licensors to extract a “premium remuneration” through exclusivity where the pricing practice led to “artificial price differences”, i.e. in differences that could not be justified according to the criteria stated by the Court, in each of the partitioned territories.<sup>17</sup>

Thus, the Court held, on the one hand, that it was potentially compatible with the Treaty to place geographic limitations on the scope of the TV sports rights granted to licensees due to the “language-dependent” and eminently “territorial” nature of these services. On the other, it would be incompatible with the good functioning of the internal market to accompany these limitations with an exclusive right to control access to that signal across the EU and in particular to prevent users relying on devices purchased in a given Member State from receiving that signal elsewhere within the Union.<sup>18</sup> It was therefore concluded that the prohibition of the use of a foreign decoder had infringed the free movement of services’ rules. Since the licensor in the state where the communication had originated had consented that, thanks to the purchase of the decoding device, the purchaser could receive and view protected content on which an exclusive license insisted and had been remunerated for it, that “subject matter” was not compromised.<sup>19</sup> The CJEU held that to prevent users situated elsewhere within the internal market to receive and view these images by means of a “foreign” but nonetheless “lawful” device” would have gone beyond what was strictly necessary to maintain the integrity of the rights licensed to each broadcaster in each member states.<sup>20</sup>

Finally, the Court of Justice addressed the question of whether the territorial exclusivity clause contained in the licensing agreements concluded between the FAPL and each of its broadcasting rights’ licensees, each in its geographic area of operation, infringed Article 101(1) TFEU. The Court recalled that the granting of exclusive licenses allowing the broadcasting of “protected subject matter” in each member state in regime of exclusivity would not have been incompatible with the EU competition rules.<sup>21</sup> However, the CJEU held that contractual provisions preventing broadcasters from supplying decoding devices that enabled access to broadcasting services outside the territory in respect of which the license had been granted restrained all cross-border supply of these services and consequently led to the internal market being partitioned along national boundaries.<sup>22</sup> The Court acknowledged that a broadcasting license such as the one at issue in *Murphy* could have granted to

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<sup>13</sup> Id., para. 107.

<sup>14</sup> Id., para. 108.

<sup>15</sup> Id., para. 110.

<sup>16</sup> Id., para. 114.

<sup>17</sup> Id., para. 115.

<sup>18</sup> Ibid.; see also para. 117.

<sup>19</sup> Id., para. 119-120.

<sup>20</sup> Ibid.; see also para. 124.

<sup>21</sup> Id., para. 137.

<sup>22</sup> Id., para. 141; see also para. 139-140.

the licensee an exclusive right to broadcast “protected content” for a specific period of time and could have even limited the territorial reach of that right to areas coinciding with individual member states.<sup>23</sup> Nonetheless, it was held that to extend the scope of that exclusive right as far as to enable the licensee to prevent users from receiving the broadcast by means of a foreign, but not illicit, device in another member state would have gone beyond what was required to safeguard the “subject-matter” of the right in issue,<sup>24</sup> since it would have eliminated all competition as regards the cross-border supply of these services.<sup>25</sup>

The CJEU, however, subjected these conclusions to an important exception: it held that once the broadcasts had been received in a member state other than the one “of origin” of the decoding device, the corresponding right of the cardholder to “communicate to the public” those images was constrained by the corresponding need to continue safeguarding the integrity of material that had been granted copyright protection under domestic law.<sup>26</sup> Consequently, if certain elements of the broadcast, which were “the expression of the authors’ own intellectual creation”, were distinct from the “subject matter” of the broadcasting rights, i.e. they could be “separated” from the images of the matches, as they unfolded on the screen<sup>27</sup> and could not have been “communicated to the public” without authorisation from the holder of the copyright.<sup>28</sup> Thus, the FAPL could legitimately oppose the showing to the general public of elements of the transmissions such as “(...) the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics(...)”.<sup>29</sup> Nevertheless, the Court emphasised that since this exception could not affect private viewing via decoders purchased elsewhere in the EU.<sup>30</sup> Where transmission of the games was confined to purely domestic premises, it would have remained an authorised form of exercise of the right to receive the protected broadcast.<sup>31</sup> As a result, the owner of the device would not have been obliged to “efface” from the broadcast the “protected elements”, i.e. those parts of the broadcast protected by copyright.<sup>32</sup>

It is concluded that the 2011 preliminary ruling provides important guidance in the assessment of the legitimacy of licenses concerning the broadcasting of sports events in light of the EU internal market rules. It is suggested that as a result of this decision broadcasters can no longer opposed certain forms of “unauthorised” transmission and reception of this type of content in a member state other than the one in which a decoding device had legitimately been purchased, albeit under certain conditions applicable only to “communications to the public” of protected images. Consequently, it seems to have become much more difficult for holders of expensive and “hard won” broadcasting rights to uphold the territorial exclusivity of these licenses as well as to obtain “premium profits” from the exploitation of their rights.<sup>33</sup> The next section will consider some of the implications that the *Murphy* judgment could have for the licensing of other audiovisual rights.

### 3. The aftermath of *Murphy*. From football to movies... all change?

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<sup>23</sup> Case 262/81, *Coditel v Cine Vog* (No 2), [1982] ECR 3381, para. 15-16.

<sup>24</sup> *Murphy*, para. 139, 142.

<sup>25</sup> See *Murphy*, para. 141-143; cf. *Coditel* (no 2), cit. (fn. 23), para. 9, 15.

<sup>26</sup> *Id.*, para. 154.

<sup>27</sup> *Id.*, para. 155; see also para. 149.

<sup>28</sup> *Ibid.*; see also para. 156-157.

<sup>29</sup> *Id.*, para. 148-149, 158.

<sup>30</sup> *Id.*, para. 175.

<sup>31</sup> *Id.*, para. 177.

<sup>32</sup> *Id.*, para. 181-182.

<sup>33</sup> See inter alia Robertson, cit. (fn. 1), pp. 215-217; see also Pibworth, “The *Murphy* judgment: not quite full time for football broadcasting rights”, (2012) 8(2) *CompLRev* 209, p. 214.

The previous section highlighted that the CJEU in *Murphy* sought to limit considerably any inroads into the scope of the internal market rules, especially by adopting a very narrow view of what constitutes the “specific subject-matter” of broadcasting rights.<sup>34</sup> Commentators interpreted the judgment as a strong restatement of the goal of market integration in relation to the broadcasting industry and as giving an unambiguous warning that any attempt to resort to price discrimination to land “premium remuneration” would be caught by the competition and free movement rules.<sup>35</sup>

It is thus difficult to understate the importance of *Murphy*. Admittedly, if regard is to be had to the now well-established approaches adopted in the field of EU antitrust law vis-à-vis territorial exclusivity generally, the 2011 preliminary ruling is consistent with long-held views as to the illegality of arrangement resulting in the partitioning of the internal market.<sup>36</sup> However, to what extent does the decision question the continuing legitimacy under EU law of current approaches to licensing in relation to other types of audiovisual content, such as films or TV series? On this point, it has been shown in recent literature that the ability of pay-TV and pay-per-view broadcasters to offer audiences “premium content” of this type has become essential for incumbents as well as new entrants.<sup>37</sup> Consequently, it is suggested that due to the high costs of acquiring such content, if the *Murphy* ruling were to apply in a similar way in this context, it could discourage broadcasters, especially new or smaller ones, from bidding for the associated broadcasting rights.

This section examines whether the principles enshrined in the 2011 preliminary ruling can be relied upon to allow the reception of films and other similar content outwith the territory where the relevant decoding device was originally purchased in the same way as for live sports’ programmes. It is acknowledged that the limited remit of this paper does not allow for a full examination of these issues, which go to the core of the interplay between the demands of the internal market and the need to preserve the integrity of copyright and other “neighbouring rights”,<sup>38</sup> nonetheless, some summary considerations can and should be made.

The justification for protecting films by way of copyright lies in their nature as ‘works’, authored by one or more individuals and thus constituting the outcome of their “intellectual creation”.<sup>39</sup> By contrast, sports events have received different forms of protection in the legal systems of the member states. According to the CJEU, a sporting event as such does not enjoy protection via “traditional” intellectual property rights.<sup>40</sup> In other words, images of sports events that are transmitted on air after being selected and assembled by a director, as opposed to the unfolding of the event itself, should be considered sufficiently original and thereby would justify the extension of copyright in domestic law.<sup>41</sup> Nonetheless, the Court has accepted that this does not prevent domestic legislatures protecting the economic value of such content, in view of its “unique and to that extent original character”, through entitlements akin to copyright.<sup>42</sup> It was emphasised that due to the “scarcity” and “exclusivity” of

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<sup>34</sup> Doukas, “The Sky is not the (only) limit: sports broadcasting without frontiers and the Court of Justice”, (2012) 37(5) ELRev 605, p. 612-613.

<sup>35</sup> Ibid.; see also, inter alia Pibworth, cit. (fn. 33), p. 212-213.

<sup>36</sup> See e.g. case C-501/06, GSK Services and others v Commission, [2009] ECR I-9291, especially paras. 59-64.

<sup>37</sup> See Geradin, “Competition law problems raised by the entry of incumbent telecommunication operators in the media content delivery market”, paper given at the University of Zurich, 7 December 2005, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=796066](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=796066), especially pp. 6-8.

<sup>38</sup> See e.g., mutatis mutandis, case C-395/87, *Ministere Public v Tournier*, [1989] ECR 2521; C-607/11, *ITV v Catch Up TV*, [2013] ECR I-147; for commentary see inter alia Rosati, “Toward an EU-wide copyright?”, (2013) IPQ 47.

<sup>39</sup> See e.g., mutatis mutandis, case C-5/08, *Infopaq*, [2009] ECR I-6569; for commentary, inter alia Rosati, cit. (fn. 38), pp. 52-54.

<sup>40</sup> See *Murphy*, para. 99.

<sup>41</sup> See *Murphy*, para. 149-150, 98-100; see also Margoni, “The protection of sports events in the EU”, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2652991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652991), pp. 9-10.

<sup>42</sup> Ibid.

premium sports rights, their acquisition creates significant economic risks for undertakings so that it is essential to ensure that their investment value is effectively protected.<sup>43</sup>

At the same time, the right to broadcast these events in a regime of exclusivity vis-a-vis other broadcasters remains a financially significant "commodity" for TV channels and, increasingly so, for "new media" companies. It is for these reasons that the "owners" of the exclusive right to transmit live images (i.e. the national football leagues, representing individual clubs) have been obliged to engage in open and transparent tendering processes for their sale as well as to avoid, inter alia, the selling of specific "bundles" of broadcasting rights for prized teams and matches to the same bidder.<sup>44</sup> However, the ubiquitous practice of "protecting" the position of the winning bidder via the conferral of territorially exclusive rights has been brought back into question by the 2011 ruling, on the ground that licensees are no longer entitled to enjoy absolute territorial protection for their broadcasting rights in exchange for a "premium fee".<sup>45</sup>

Against this background, it is not surprising that several commentators hailed *Murphy* as a "game-changer" in respect of the hitherto leading legal approaches to the licensing of broadcasting rights, whether to sports' events or, conceivably, cinematic and other audiovisual content. It was feared that as a result of the 2011 ruling individual broadcasters would no longer be able to protect the value of their investment against foreign rivals, who may have paid "less" for the purchase of the right to transmit live images of the same events in their own territory; it was also argued that an inability to reap a "more than normal" profit would jeopardise the ability of individual companies to reinvest in more innovative programmes in the future, as well as to cover the costs required to promote content currently being shown.<sup>46</sup>

So what impact has *Murphy* had on earlier jurisprudence relating to the licensing of films and other audiovisual content? As was confirmed by the CJEU in *Murphy* itself, in principle it remains legitimate for a licensee of cinematic content to exploit its right to "first showing" and to safeguard and exploit its right to "control" future releases in a given territory, for which it had been appointed exclusive distributor, in line with the earlier *Coditel* decision.<sup>47</sup> In *Coditel* the Court had held that copyright in cinematic works could not be "exhausted" simply as a result of one airing.<sup>48</sup> Since this type of material could be "communicated to the public" via performances that could be repeated indefinitely, the "subject matter" of the right should be recognised as encompassing the entitlement to a fee for each showing of the film, calculated on the basis of the approximate size of the audience resulting from the release and transmission.<sup>49</sup>

As to the compatibility with the Treaty of exclusive territorial clauses, the Court in *Coditel* observed that these arrangements reflected key features of the relevant market in the EU,<sup>50</sup> such as the existence of pronounced cultural and linguistic differences on the demand side and, on the supply side, the reliance on public funding, which was awarded on a national basis according to criteria and procedures that varied from Member State to Member State and often in the broader context of a tightly regulated TV broadcasting industry in general.<sup>51</sup> Moreover, such funding took place in the context of broadcasting systems that, at least at the time, still functioned as state monopolies in all member states.<sup>52</sup> In light of the forgoing the Court concluded that it would have been "impractical" for licensors to rely on criteria other than those based on geographic principles in order to determine

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<sup>43</sup> Ibid.; see also Margoni, cit. (fn. 41), p. 7.

<sup>44</sup> Margoni, cit. (fn. 41), pp. 2-3; also Geradin, cit. (fn. 37), pp. 71-72.

<sup>45</sup> *Murphy*, para. 118-121; see also para. 106 and 122.

<sup>46</sup> See inter alia Donders and Van Rompuy, "The EBU Eurovision System governing the joint buying of sports broadcasting rights", (2013) 9(2) *CompLRev* 7, pp. 22-23.

<sup>47</sup> Case 62/79, *Coditel v Cine-Vogt* (no 1) (hereinafter referred to as *Coditel I*), [1980] ECR 881, para. 12-13.

<sup>48</sup> *Id.*, para. 14.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Coditel II*, cit. (fn. 47), para. 15-16.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Id.*, para. 17.

the scope of the rights enjoyed by each licensee.<sup>53</sup> The legal and economic context in which these arrangements took effect thus provided a justification for subjecting the licensees' exclusive prerogatives to territorial criteria, even when this resulted in re-erecting national boundaries. To what extent can it be argued that the *Coditel* jurisprudence has in effect been overruled by *Murphy*? Or should the judgment be read in a more restrictive manner and its reach limited to encompassing only the "communication to the public" of live sports events?

At the outset, it should be noted that a significant difference exists between the facts of *Murphy* and *Coditel*: the latter case concerned the unauthorised showing of a film in a member state other than the one for which a license had been granted, while in the former, the owner of the decoding device had, by purchasing it from a licensee authorised to sell such devices in the member state from which the signal was transmitted, obtained such permission.<sup>54</sup> It has consequently been suggested that in *Murphy* the user, by purchasing a decoding device from an authorised dealer—albeit one based in a member state other from the one in which the protected images were viewed—had engaged in a "permitted viewing" of the sports events concerned.<sup>55</sup> By contrast, in *Coditel* no such permission had been granted—in other words, the viewing had not been authorised by the rightful licence-holder.<sup>56</sup> It may therefore be argued that in *Murphy*, as opposed to in earlier decisions, some form of "assent" to the viewing had been given and a reward afforded to the licensee—via the payment of a fee associated with the purchase of a decoding device "somewhere" in the EU— and as a result, the "core" function of the right enjoyed by the FAPL had been respected. Thus, any other restriction on the freedom of viewers to receive broadcasting services anywhere in the internal market would have represented a disproportionate interference with the free movement principles.<sup>57</sup>

It is however submitted that a perhaps more convincing argument in favour of limiting the reach of *Murphy* only to sports broadcasting stems from a closer scrutiny of the nature of film rights. It is suggested that given the "peculiar" nature of these rights, the grant of absolute territorial restrictions in the field of film licensing may not lead to an "artificial" partitioning of the internal market.<sup>58</sup> It may be recalled that in *Coditel II* the CJEU linked the relevance of geographic criteria in the field of film licensing to distinctive features of the cinema industry, which remains predominantly organised along national boundaries.<sup>59</sup> On that basis, it was held that the "legal and economic context" in which these licensing deals were stipulated justified objectively the imposition of territorial limitations.<sup>60</sup> Specifically, the Court of Justice appeared to suggest in *Coditel* and later in *Murphy* that when it comes to the "communication to the public" of films—namely to their repeatable performance—this outcome may be inevitable.<sup>61</sup>

The above conclusions seem to have been confirmed by recent economic analysis of the broadcasting industry in the EU. An independent report, published in 2014 by the Centre for European Policy Studies, pointed to the existence of significant, objective barriers to entry and expansion preventing the full integration of national film markets into an EU-wide one. It was illustrated that on the supply-side, European producers tend to have a relatively small financial size and consequently do not enjoy the same bargaining power vis-à-vis their larger non-European rivals when negotiating with distributors or TV channels and networks.<sup>62</sup> It has also been suggested that cultural and linguistic

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<sup>53</sup> Ibid.

<sup>54</sup> *Murphy*, para. 113-116.

<sup>55</sup> Id., para. 120.

<sup>56</sup> Ibid.; see also para. 115-116; see also *Coditel* (no 2), cit. (fn. 47), para. 15-16.

<sup>57</sup> *Murphy*, para. 115-116.

<sup>58</sup> See e.g., mutatis mutandis, Geradin, cit. (fn. 37), pp. 87-88.

<sup>59</sup> *Coditel* (no 2), cit. (fn. 47), para. 15-16.

<sup>60</sup> Id., para. 15-16.

<sup>61</sup> Id., para. 17; see also para. 15; for commentary, inter alia McKnight, "Copyright and a single market in broadcasting", (1992) 14(10) EIPR 343, pp. 347-348.

<sup>62</sup> Centre for European Policy Studies, Report: Copyright in the EU Digital Single Market (2013), available at: <https://www.ceps.eu/system/files/Copyright%20in%20the%20EU%20Digital%20Single%20Market%20FINAL%20e-version.pdf>, hereinafter referred to as 'CEPS Report', p. 53.



diversity, with varying preferences and demand specificities in each member state, require each producer to invest in the adaptation of content (e.g. by financing translation and dubbing) if they are to export successfully to different geographic areas within the Union.<sup>63</sup> As a result, film and TV series production companies tend to target their production and marketing efforts only at those areas in which they forecast the greatest demand.<sup>64</sup> It is added that film companies often rely on public subsidies (which are awarded on a national basis) as a means of financing their activities and that distributors and cinema owners, who are entrusted with distributing cinematic content to the public, are usually required to expend substantial resources in targeting advertising and promotion campaigns to the local population through localised efforts.<sup>65</sup>

In light of the forgoing analysis, it appears difficult to conclude that the the *Coditel* approach has become obsolete as a result of *Murphy*, at least as far as the “communication to the public” of films is concerned. It is argued that, notwithstanding the increasing reliance on online platforms and other “de-localised” channels for the communication to the public of films and TV series,<sup>66</sup> the “territorial nature” of film production emerges as a clear feature of this industry.<sup>67</sup> In other words, the characteristics of the “legal and economic context” in which the “communication to the public” of films and other cinematic content occur appear to point to the conclusion that it would not be a “disproportionate” restriction of the free movement of broadcasting services within the EU to afford to the licensee the right to exploit commercially the “first showing” and more generally to control further performances of a film in a regime of absolute territorial protection.

It is therefore submitted that individual licenses providing for absolute territorial protection for the licensee’s rights would not be contrary to the Treaty rules: so long as these clauses are linked to objective factors characterising the industry, such as, for instance, the need to protect investment in the “linguistic adaptation” of individual productions, these arrangements are likely to remain compatible with the internal market principles: in this context, it is added that if the license allows the licensor to obtain “premium” royalties, the latter would not infringe Article 56, provided that they are the only way in which these investments can be recouped.<sup>68</sup> It cannot however be excluded that the status quo outlined above may change in the near future: the 2016 EU Commission’s Communication as regards the promotion of a “fair, efficient and competitive European copyright-based economy in the digital single market” makes it a priority to increase the availability of audio-visual works throughout the Union.<sup>69</sup> Whether by actively encouraging the adoption of “streamlined” licensing practices or the reliance upon innovative channels for the provision of these services, especially in areas that are geographically difficult to reach, the EU institutions have expressed a clear commitment to tackling the features of the industry that may strand in the way of integrating otherwise ostensibly “national” markets.<sup>70</sup> For this purpose, the Communication highlights as one of its priorities

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<sup>63</sup> See inter alia, mutatis mutandis, European Commission Joint Research Centre, Gomez and Martens, Digital Economy Working Paper 2015-04: “Language, copyright and geographic segmentation in the EU digital single market for music and film” (hereinafter referred to as JRC report), available at: [https://ec.europa.eu/jrc/sites/default/files/JRC92236\\_Language\\_Copyright.pdf](https://ec.europa.eu/jrc/sites/default/files/JRC92236_Language_Copyright.pdf), p. 18.

<sup>64</sup> Ibid.; see also, mutatis mutandis, Burri Nenova, “The reform of the Community Audio-visual Media Directive: television without cultural diversity”, (2007) 14(2) IJCP 169, pp. 171-173.

<sup>65</sup> Ibid.

<sup>66</sup> See e.g. Proposal for a new Directive of the European Parliament and the Council amending Directive 2010/13/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, adopted on 25 May 2016, {SWD(2016) 168 final}, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618463840&uri=COM:2016:287:FIN>.

<sup>67</sup> See CEPS report, p. 56; see also, mutatis mutandis, Stothers, “Copyright and the ECT Treaty: movies, films and football”, (2009) 31(5) EIPR 272, pp. 278-279.

<sup>68</sup> See e.g. *Coditel II*, para. 16-17; also *Murphy*, para. 104-108; also para. 118-121.

<sup>69</sup> See EU Commission, Communication of 14 September 2016, (2016)COM 592 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0592>.

<sup>70</sup> Id., p. 2-3.

“increasing efficiency” in the allocation of EU funding devoted to financing dubbing and subtitling of content so that the latter can reach out to a wider, cross-border audience.<sup>71</sup>

The preceding observations can be usefully compared with the position of live sports broadcasts. In addition to lacking the same degree of “originality” characteristic of films, these programmes tend to be less “language-dependent” and, especially when it comes to high profile sports (such as football), less “local” in terms of viewers’ preferences.<sup>72</sup> As is confirmed by the circumstances of the *Murphy* case, the exclusive right to screen “popular” events such as English Premier League matches represents a “valuable commodity” not just in the United Kingdom but also in Malta, Greece and other states within the EU.<sup>73</sup> It may also be noted that, as is now established practice for Sky plc, these events can be viewed without the aid of a voice feed that is usually offered in the language of the state where the signal originated—in other words, the language of the “official” licensee for the Premier League in a given area.<sup>74</sup>

In light of the forgoing, it is argued that audiovisual services of this kind are far more “mobile” than those relating to cinematic content and that the conditions for granting absolute territorial protection to licensees will be difficult to make out, any such restriction being likely to be considered simply a means of maximising profit.<sup>75</sup> Nor is this approach incompatible with the right for the parties to negotiate a fee that takes into due consideration the size of the audience that may access the broadcast. Since live sports’ broadcasts can only be received via a decoding device or a pay-per-view platform the licensor would be in a position to gauge the audience interested in viewing its services. It would consequently be open to the parties to a licensing agreement to fix a payment reflecting the possibility that this audience may “straddle” multiple areas of the Union, going beyond the confines of a specific language group.<sup>76</sup>

Finally, it is suggested that additional concerns for market access, especially vis-à-vis new entrants and especially undertakings seeking to compete on the audio-visual content market by relying on new technologies (such as internet webcasting), may justify a more proactive approach to antitrust intervention in the field of sports rights. It is argued that maintaining EU markets for audio-visual services as open and unsegmented as possible is indispensable to forestall increased concentration in the face of significant barriers to entry and expansion.<sup>77</sup> Consequently, it is suggested that so long as the minimum requirement of “authorisation” in the country of origin of the decoding device is fulfilled, allowing the free movement of this type of broadcasting service would lessen (or at least would not contribute to strengthening) the economic power of broadcasters active mainly, if not exclusively, in the territory of one member state; it would also avoid erecting barriers to entry that are not strictly necessary to safeguards the “subject-matter” of these rights.<sup>78</sup>

It is concluded that the approach upheld by the CJEU in the *Murphy* preliminary ruling remains consistent with the need to attain the market integration goal in an industry where the “commodities” being traded—namely sports broadcasting services—have an appeal that goes beyond territorial and

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<sup>71</sup> Ibid.

<sup>72</sup> See inter alia, mutatis mutandis, European Commission Joint Research Centre, Gomez and Martens, Digital Economy Working Paper 2015-04: “Language, copyright and geographic segmentation in the EU digital single market for music and film” (hereinafter referred to as JRC report), available at: [https://ec.europa.eu/jrc/sites/default/files/JRC92236\\_Language\\_Copyright.pdf](https://ec.europa.eu/jrc/sites/default/files/JRC92236_Language_Copyright.pdf), p. 18.

<sup>73</sup> Ibid.; see also, mutatis mutandis, Espantaleon, “Exhaustion light in European television”, (2010) 32(1) EIPR 29, p. 35.

<sup>74</sup> See Donders and Van Rompuy, “The EBU Eurovision System governing the joint buying of sports broadcasting rights”, (2013) 9(2) CompLRev 7, pp. 21-22.

<sup>75</sup> Study on sports’ organisers’ rights in the EU, ASSER Institute, (2014), available at: <http://www.ivir.nl/publicaties/download/1353>, hereinafter referred to as ‘Asser Report’, pp. 71-72.

<sup>76</sup> See inter alia Margoni, “The protection of sports events in the European Union”, (2015), available at: <http://ssrn.com/abstract=2652991>, pp. 15-16; also Espantaleon, cit. (fn. 73), pp. 40-41.

<sup>77</sup> Mutatis mutandis, id., pp. 83-84.

<sup>78</sup> Ibid.

sometimes linguistic boundaries.<sup>79</sup> However, it would perhaps be “unwise” to extend the remit of the *Murphy* judgment to encompass licenses for the broadcasting of other types of content, such as films or TV series, due to the considerable differences that exist in the “legal and economic contexts” characterising, respectively, the licensing of rights concerning the “communication to the public” of cinematic content and the live broadcasting of sports events.

#### 4. “I feel the earth move”: the reaction to *Murphy* on the part of the FAPL, BskyB and beyond

##### 4.1 Reconciling the “territorial” nature of broadcasting with open markets—is *Murphy* heralding more work for IP lawyers?

The previous section summarised the main grounds of the *Murphy* preliminary ruling and illustrated how this decision has affected much of the “established wisdom” as regards the rules governing TV broadcasting licenses.<sup>80</sup> This section considers to what extent the judgment has already influenced, or is likely to do so in the future, the commercial practices adopted by broadcasters and their licensors. In the aftermath of *Murphy* it was suggested that the only way forward for sports broadcasters would be to conclude pan-EU licensing arrangements: by allowing them to set a “Europe-wide” fee—i.e. a fee that could take into account the possibility of programmes being received everywhere within the Union, regardless of where the signal had originated—these practice would allow both parties to protect more effectively the value of their respective investments.<sup>81</sup>

This outcome, however, was regarded as having potentially detrimental effects on licensees and eventually also on end users. It was argued that a uniform fee would not allow the “cross-subsidisation” of resources to support, for instance, more territory specific services and could even result, in the longer term, in less content being produced.<sup>82</sup> Ultimately, it was suggested that certain customers would be hit with a higher bill for their cable and pay-TV packages, on the ground that the price would be calculated by taking into consideration demand in more “well-to-do” states.<sup>83</sup>

While the limited remit of this paper does not allow for a full examination of the issues surrounding pan-EU licenses, it should be noted at this junction that recent research shows a distinct lack of interest in such arrangements in the market for the broadcasting of cinematic content, whether via cable or TV or via “new” media (such as the internet).<sup>84</sup> The operation of different “time windows” for the release of films in individual member states so that producers can “cover costs, secure return on investments” and generate enough resources to continue producing new content; continuing cultural diversity and linguistic specificities; as well as, on the supply side, the dependency on public, nationally awarded funding have made these arrangements extremely complex in practice to negotiate.<sup>85</sup>

It is, however, also apparent that any plan in the wake of *Murphy*, for broadcasters and football leagues to agree licensing agreements spanning the whole of the EU has so far, similarly, failed to gain any traction.<sup>86</sup> Having regard more specifically to the parties to the *Murphy* litigation, it is certainly true that as a result of this decision the English FA had to renegotiate the terms of its licenses to ensure compliance with the new rules. However, rather than seeking to agree a uniform fee applicable across the Union or to limit the freedom of licensees to honour “passive sales” of decoding devices to

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<sup>79</sup> Geradin, cit. (fn. 37), p. 70.

<sup>80</sup> *Murphy*, see e.g. para. 97-99, 115-121, 126-132.

<sup>81</sup> See *Murphy*, para. 112; for commentary see e.g. Pibworth, cit. (fn. 33), pp. 214-215.

<sup>82</sup> See e.g. Robertson, cit. (fn. 1), p. 217-218; see also Doukas, cit. (fn. 34), p. 614.

<sup>83</sup> Inter alia Doukas, loc. ult. cit.

<sup>84</sup> CEPS report, p. 55.

<sup>85</sup> Id., pp. 57-58.

<sup>86</sup> Ibid.

customers outside their area, the FAPL instead sought to impose other restrictions in its arrangements. As a result, licensees could no longer offer an “official English language feed” to viewers outside English speaking areas, i.e. the UK and Ireland. The FAPL also envisaged the extension of the partial embargo time—scheduled for UK and Ireland-based viewers from two till five pm on Saturday afternoon—to licensees based elsewhere in the Union, so that they could only air one Premier League game on Saturday afternoon.<sup>87</sup>

It was therefore suggested that the English FA had succeeded, at least in part, in minimising the significant damage that could have resulted from the 2011 decision, by, on the one hand, ensuring the respect of the “embargo time” imposed on “authorised licensees”<sup>88</sup> and on the other hand, by leaving intact the right, recognised by the Court, of those receiving protected signals anywhere in the Union, to choose where to purchase their decoding devices within the internal market.<sup>89</sup> However, it is not clear whether this represents the last word as to whether these licensing agreements comply with the internal market rules.

Having regard to the “closed period” obligations, it should be remembered that they are part of a long-standing practice designed to avoid “undermining attendance or even amateur participation” in sports activities.<sup>90</sup> Nonetheless, the recent evolution of licensing practices in the field of broadcasting has so far pointed to the progressive disappearance of these clauses in many member states. Accordingly, it may be wondered whether, by de facto imposing a uniform ban on broadcasting some of the Premier League matches, the conduct of the FAPL could undermine rivalry among media content suppliers. An independent report suggested that the new FAPL licensing terms could over time jeopardise the goal of realising a single market for cross-border broadcasting of live sports: the inability of individuals to view the matches they wanted at the time they had expected and to receive commentary in a language other than their own could adversely affect the enjoyment of their right to receive these services anywhere within the Union.<sup>91</sup>

In light of the forgoing, it is suggested that as the EU takes concrete steps toward the realisation of a border-less market for the provision of audio-visual content via a variety of channels, licensors such as the FAPL may have to accept significant changes in their licensing practices, so that consumers can have access to a wide array of content at “fairer and more legally secure” conditions.<sup>92</sup> To that end, the EU Commission envisaged, among other initiatives, doing away with “embargoing” the transmission of certain forms of valuable content and increasing the interoperability between the standards used to, respectively, create and decode cross border programmes.<sup>93</sup>

It is concluded that *Murphy* has not to date been as ground-breaking as would have been expected for the parties to the proceedings or indeed for the market, seen as a whole. The pan-EU licenses that had initially been considered inevitable as a result of the decision have so far failed to emerge. Sports broadcasters and their licensors have opted for a “softer response” to the challenges heralded by the ruling, by altering their licensing practices and thereby seeking to discourage the “free movement of decoding devices”. It can therefore be expected that as the EU Commission seeks to take action toward the realisation of a fully-functioning digital single market in audio-visual services, its proposals will aim to tackle these and other obstacles to the free movement of broadcasting services, especially by spearheading change in the licensing practices that have so far characterised this industry.

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<sup>87</sup> See e.g. Asser report, p. 98.

<sup>88</sup> *Id.*, p.100.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> Asser report, pp.100-101.

<sup>92</sup> EU Commission, Communication, cit. (fn. 69), p. 3.

<sup>93</sup> *Ibid.*

#### 4.2 Maintaining the integrity of the value of live sports programmes in an increasingly integrated market— the role of IP litigation

The previous section examined the immediate impact of the *Murphy* ruling on the licensing practices of the FAPL and its licensed broadcasters, especially BskyB. Since October 2011 the industry has, however, continued to change, slowly but steadily, both in its structural make up and in the behaviour of its main players. Accordingly, a question arises as to whether at the core of the strategies adopted in the field of civil litigation by the FAPL as well as the industrial reorganisation undertaken by BskyB as licensed broadcaster there is a concern to “salvage” some of the economic value attached to their investment in sports rights. This section examines whether the FAPL made a conscious decision to rely on its copyright over the “creative” fragments of the broadcasts over which it enjoyed IP rights in order to contain any damages caused to its revenue by the showing of football matches via foreign devices. The next section considers consolidation in the broadcasting market.

It may be recalled that according to the CJEU in *Murphy*, a distinction should be drawn between the “main broadcast”, i.e. the live images of a sport event, and those elements of the programme that are the outcome of an autonomous creative effort on the part of their owner, thus justifying copyright protection. These were items such as the FAPL logo, its anthem and the “opening sequences” of each broadcast.<sup>94</sup> The Court held that unless the person engaged in a “communication to the public” of these images through a “foreign” decoding device had obtained a separate copyright license to show these “proprietary fragments” of the broadcast,<sup>95</sup> they would be liable for copyright infringement if they did not take the necessary steps to “efface” these elements from the communication of the main programme.<sup>96</sup> By contrast, the reproduction of copyrightable material in “purely private circles” would have “the sole purpose of enabling the lawful use of the works”.<sup>97</sup>

Fast forward a few years, and the FAPL set out to “work” on what looks like a strategy designed to rely on this exception to the “*Murphy* principle”, at the expense of a number of pub landlords and tenants across the British Isles. Among them was Mr Anthony Luxton, the landlord of the Rhyddings Pub in Swansea, who was taken to Court by the Premier League on the ground of having “illicitly used” a foreign (in this case, a Danish) decoder card to show football matches in his pub. No longer able to rely on the territorial exclusivity of its licenses, the Premier League resolved to rely instead on the “intellectual creation” exception to restrain pubs from showing not the “action” on the pitch, but rather the “graphics” and the other “broadcast fragments” that were the outcome of its “creative efforts” and over which it retained full copyright.<sup>98</sup>

In *FAPL v Luxton*, Helen Davies QC successfully argued before the High Court that the defendant had infringed the copyright in valuable “proprietary fragments” of the broadcast that were, in the words of the CJEU, the fruit of the “intellectual creation” of the FAPL and whose exclusivity could therefore be maintained.<sup>99</sup> The decision against Luxton was welcomed by the complainant as a victory in its effort to protect the value of the Premier League’s brand and goodwill in an era in which territorial protection was no longer an option.<sup>100</sup> Importantly, a FAPL spokesperson stated that this

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<sup>94</sup> Id., para. 157-159.

<sup>95</sup> Id., para. 158-159.

<sup>96</sup> Id., para. 174; see also para. 197-198, 204.

<sup>97</sup> Id., para. 172.

<sup>98</sup> Football Association Premier League v Luxton, [2014] EWHC 253. See also <http://www.bbc.co.uk/news/uk-wales-south-west-wales-25968200>.

<sup>99</sup> Id., per Rose J, para. 30-32.

<sup>100</sup> See inter alia Giles, “Broadcasting Post-Murphy: the territorial TV licensing changing landscape”, (2014) 12(6) World Sports L Rev, available at: <http://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-landscape>.

did not represent an isolated case, but was the first of 100 new copyright prosecutions against those pub landlords and tenants who had opted to exercise their right to freedom of movement of services, as sanctioned by the *Murphy* judgment without, however, "effacing" the proprietary images and logos from their broadcast.<sup>101</sup>

A few weeks later, Mr Berry, responsible for the First National Wine Bar in Liverpool City centre became the target of a similar set of writs. Before the High Court the pub landlord admitted to having infringed the applicant's copyright<sup>102</sup> and consequently the Court awarded the FAPL an interim payment of over £60,000.<sup>103</sup> Commenting in the local *Liverpool Echo*,<sup>104</sup> Mr Berry declared:

"They didn't like me showing the football because they're not getting anything directly from it. I deal with legitimate suppliers. I think they're pursuing me because I'm a sole trader. I'm one person with no money, and they want to make an example."<sup>105</sup>

It only took a few more months before a similar action reached the Scottish Courts. *Lisini Pub Ltd* concerned an attempt on the part of the Scottish Premier League to enjoin the respondent from showing matches of teams belonging to the League by using a "foreign device". Initially, in 2007 the Sheriff Court in Hamilton had granted an interdict to this effect.<sup>106</sup> However, in March 2013 the Court recalled the interdict following a motion made by Lisini to have the order lifted as a result of the finding made by the CJEU that a restriction on the use of foreign decoders and smart cards constituted a breach of the competition rules.<sup>107</sup> The following November, the Court of Session, after further consideration of the motion, declined to hand down a perpetual interdict to restrain Lisini from showing the matches through a "foreign device".<sup>108</sup> In its view, the applicant had provided sufficient evidence that, following the *Murphy* preliminary ruling, the undertaking originally sanctioned in the 2007 interdict had become void and unenforceable, on account of infringing the Treaty competition rules.<sup>109</sup> Thus, due to the impact of the CJEU's decision in 2011 another set of domestic courts, this time in Scotland, is in the position of probing the limits of the "copyright exception" discussed above and in particular to decide to what extent a sports broadcasting licensor (in this case the SPL) could rely on it to protect the value of its "brand" as exemplified in, inter alia, its logo.<sup>110</sup>

In light of the forgoing analysis, it may be concluded that what the future holds for any individual or business wishing to rely on his or her prerogatives as a "good EU citizen" and thereby enjoy his or her freedom of movement of services thanks to a foreign decoder card allowing them to receive FAPL broadcasts remains uncertain. It may be suggested that private viewers wishing to rely on their right to free movement of broadcasting services 'à la *Murphy*' should still be capable of doing so without being threatened with legal action by the FAPL or licensors in a similar position to the latter. Nonetheless, it is also clear, in light of judgments such as *Luxton* that business customers engaging in the "communication to the public" of protected images may be exposed to significant litigation risks if it did not take enough care in "effacing" the broadcast of any proprietary content. It is acknowledged that the scope of the "copyright exception" to the applicability of the free movement rules aims to strike a fair balance between the demands of a well-functioning internal market and the

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<sup>101</sup> See e.g. <http://www.bbc.co.uk/news/uk-wales-25849670>.

<sup>102</sup> Football Association Premier League v Berry, [2014] EWHC 726, per Spearman QC, Deputy J, para. 2.

<sup>103</sup> *Id.*, para. 25-28.

<sup>104</sup> See: <http://www.liverpoolecho.co.uk/news/liverpool-news/liverpool-city-centre-bar-fined-6832195>.

<sup>105</sup> *Ibid.*

<sup>106</sup> See para. 10-15, Scottish Premier League v Lisini Pub Management Co Ltd, [2013] CSOH 48.

<sup>107</sup> Scottish Premier League v Lisini Pub Management Co Ltd, [2013] CSOH 48, especially paras. 22-27.

<sup>108</sup> Scottish Premier League v Lisini Pub Management Co Ltd, [2013] CSIH 97, see especially paras. 62-64, 76-82.

<sup>109</sup> *Id.*, para. 80-82.

<sup>110</sup> See SPFL v Lisini, [2014] CSIH 6. See also, inter alia, Heaney, "European Law comes to Hamilton", (2014) 115(6) Civ P B 6; also, mutatis mutandis, Derclaye, "The Court of Justice copyright case law: quo vadis?", (2014) 36(10) EIPR 716 at 717-718.

need to safeguard the essence of copyright. However, it is unclear whether in practice the difficulties surrounding the elimination of proprietary elements from images broadcast from another member state could actually discourage undertakings or individuals taking advantage of the option offered to them by the *Murphy* preliminary ruling.

#### 4.3 BskyB and merger policy—carte blanche for maintaining the status quo?

The previous section briefly explored the FAPL's "litigation response" to *Murphy*. This section instead examines the possible implications of the 2011 ruling for the licensed broadcasters in each member state, as they seek to preserve the value of their investment in costly broadcasting rights against the background of a legal landscape in which the "traditional" IP safeguards seems no longer available.

In the aftermath of *Murphy*, commentators argued that prohibiting absolute territorial exclusivity as a means of securing a "valuation of content" consistent with the nature and size of the audiences in individual areas of the single market, would favour the "emergence of one or more large consolidated satellite broadcasters", active across the EU.<sup>111</sup> It was suggested that the outlawing of these clauses could create an incentive for broadcasters to merge in order to protect the economic value of their investment in licensed—and further licensable—content; to optimise their operational structure, especially in respect to those areas in which they had not been hitherto active; and, at the same time, to maintain their revenues at an "appealing" level for shareholders.<sup>112</sup> This outcome was, however, regarded as potentially threatening for the continuing existence of a competitive, pluralistic media market. Commentators warned that, if, rivalry would be thwarted, innovation would suffer and there would also be an unwelcome trend toward more uniform content.<sup>113</sup>

It is suggested that were media undertakings active in different geographic areas within the EU to merge into one concern, the merged entity would as a single firm be able to adopt a licensing policy based on territorial restrictions without competition law being applicable to these arrangements. As is well known, the Court of Justice has taken the view that Article 101 TFEU cannot apply to "single firm conduct", namely practices adopted within a single corporate group with a view to regulating the reciprocal commercial and organisational relations between subsidiaries and parent companies.<sup>114</sup> Thus, "(...) if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings (...)", they will not be caught by the prohibition enshrined in Article 101(1) TFEU.<sup>115</sup>

It is submitted that the forgoing considerations seem to cast the merger between the Italian and German "arms" of Sky TV—hitherto in the hands of 21<sup>st</sup> Century Fox—and BskyB in a completely different light vis-à-vis the deal adopted at the time. When the terms of the concentration had been agreed and the latter notified to the EU Commission it was suggested that this operation was mainly aimed at securing economies of scale and scope across Europe, with clear efficiency gains for all the concerned parties.<sup>116</sup> BskyB, in particular, seemed to emerge as a clear winner since through this deal it obtained access to very lucrative markets where untapped capacity existed and profits could be made. This contrasted with the climate in the UK and Ireland, which had become increasingly challenging, especially due to the emergence of new rivals in the markets for pay-TV and pay-per-view services, either alone or in combination with the supply of internet access.<sup>117</sup> It should however be

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<sup>111</sup> Robertson, cit. (fn. 1), p. 218.

<sup>112</sup> See Pibworth, cit. (fn. 33), p. 214-215.

<sup>113</sup> Robertson, loc. ult. cit.; see also Doukas, cit. (fn. 34), pp. 621, 526.

<sup>114</sup> See e.g. case C-73/95 P, *Viho Europe v Commission*, [1996] ECR I-5457; also case C-66/86, *Ahmed Saeed v Commission*, [1989] ECR I-803, para. 35.

<sup>115</sup> Case 30/87, *Bodson*, 1988] ECR 2479, para. 12.

<sup>116</sup> See e.g.: <http://www.theguardian.com/business/2014/jul/25/bskyb-buy-sky-italia-deutschland-fox>, 25 July 2014.

<sup>117</sup> See [www.reuters.com/article/2014/11/12/bskyb-brief-idUSFWN0T206J20141112](http://www.reuters.com/article/2014/11/12/bskyb-brief-idUSFWN0T206J20141112), 11 December 2014.



emphasised that in 2013 James Murdoch, then at the helm of BSkyB, the licensee for a significant bundle of broadcasting rights auctioned by the FAPL, had made a clear pledge to “sort out” his company’s pay TV strategy across Europe.<sup>118</sup>

Against this background, it may be queried whether the merger between BSkyB, Sky Italia and Sky Deutschland was also motivated by a concern to forestall the impact of the *Murphy* ruling on the licensing practices and commercial strategies deployed by the broadcasters. It is submitted that after the buyout the new entity, comprising the hitherto independent broadcasters active in, respectively, the UK and Ireland, Italy and Germany, could have reinstated those restrictions on the “free movement of decoder cards” or on the geographic reach of specific licenses. It could also conceivably have resumed its practice of imposing differing fee levels in each area of the single market, this time through a “unilateral decision” aimed at internal re-organisation post-merger, all without being caught by the reach of Article 101 TFEU.<sup>119</sup>

Similar concerns were raised in the course of the merger procedure before the EU Commission. A number of respondents had submitted that especially after *Murphy* any consolidation in the market for audio-visual content and broadcasting, such as that resulting from the proposed concentration, could lead to weaker competition due to the emergence of a large player operating across the Union.<sup>120</sup> They expressed the concern that such a prominent and economically powerful incumbent would have enjoyed “enormous negotiating power” and consequently would be able to secure an extensive portfolio of broadcasting rights to the detriment of smaller competitors or even new entrants who would be unable to bid for valuable content as a result.<sup>121</sup>

Despite the above concerns, the Commission cleared the concentration in July 2014. It rejected the argument that the merger would lead to the emergence of an “all-powerful” market player, thus significantly weakening competition in the European audio-visual services market; it expressed the view that since the activities of the merging parties did not overlap it was unlikely that the merged entity could have stifled rivalry in appreciable areas of the EU.<sup>122</sup> The Commission acknowledged that whereas the *Murphy* judgment could have significantly influenced the dynamics of the sports broadcasting industry, the latter continued to be “naturally” segmented along linguistic and geographic lines, which in turn reproduced the boundaries of the member states.<sup>123</sup>

The Commission attached significant importance to the fact that, despite the CJEU’s rejection of absolute territorial protection in 2011, the supply of audio-visual media content, including “valuable” content such as live sports broadcasts, continued to be allocated as a result of negotiations and bidding processes in the individual member states and according to criteria established at national and local level.<sup>124</sup> It was also pointed out that the demand for “prized” programmes was dependent on national parameters, such as consumer preferences, language homogeneity, and cultural diversity.<sup>125</sup> Having regard more specifically to live sports broadcasting, the Commission noted that consumers usually attach greater value to—and were consequently open to pay a higher price for—the ability to view “home league games” as opposed to matches from foreign series, with the important consequence that in this segment of the market demand remained strongly anchored to well-defined geographic areas.<sup>126</sup>

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<sup>118</sup> See <http://www.theguardian.com/media/2013/jul/25/james-murdoch-sky-europe>, 25 July 2013.

<sup>119</sup> See, *mutatis mutandis*, T-112-92, *Viho Europe Ltd v Commission*, [1995] ECR II-17. For media commentary in individual member states, see e.g. for Italy the leader from the Italian newspaper *La Repubblica*, of 24 July 2014: the leader on *La Repubblica* at: <http://www.repubblica.it/economia/2014/07/25/news/sky-92352319/?ref=HRER2-1>.

<sup>120</sup> Case M7332, decision of 11 September 2014, [2015] OJ C58/01, especially para. 27-28.

<sup>121</sup> *Ibid*; see also para. 30.

<sup>122</sup> *Id.*, para. 40.

<sup>123</sup> *Id.*, para. 42-43.

<sup>124</sup> *Id.*, para. 43.

<sup>125</sup> *Id.*, para. 40; see also CEPS Report, p. 20-21.

<sup>126</sup> Commission decision, *cit.* (fn. 120), para. 43.



As a result, it was held that the “arms” of the merged entity, active in different member states, would continue to bid for broadcasting rights and to further license them to individual consumers according to practices and procedures whose features were determined independently and were governed by different criteria in each member state.<sup>127</sup> It was also emphasised that even if national broadcasters had acquired attractive rights’ packages, their new-found strength on the market would have been threatened by other, perhaps smaller but equally active competitors such as, among others, the Liberty Group.<sup>128</sup> On that basis, it was concluded that the emergence of an “EU-wide” broadcasting company, capable of operating on a pan-European basis and open to negotiating and concluding “continental” licensing practices, was unlikely.<sup>129</sup>

It may be suggested, on the basis of this decision, that although *Murphy* had a significant impact on the licensing practices of the parties, it neither created any significant incentive to negotiate pan-EU licenses nor encouraged the emergence of a continental champion through merger activity.<sup>130</sup> However, it cannot be excluded that the current situation will not evolve in a way that leads to different outcomes. It should be borne in mind that the Commission decision was adopted on the basis of an ex-ante analysis of the current markets and in particular of the impact on competition that could be envisaged as a consequence of the concentration. It is further observed the outcome of the case does not preclude the future, ex post consideration of practices, especially unilateral, that the merged entity may undertake *vis-à-vis* its rivals, and customers and which could be *prima facie* objectionable in light of Article 102 TFEU.<sup>131</sup> It is therefore argued that if the merged entity came to enjoy significant market power and engaged in, for instance, the application of “different conditions to equivalent transactions”; discrimination among customers on the basis of, *inter alia*, their geographic location; or sought to “limit markets”, its conduct would infringe Article 102 TFEU.<sup>132</sup>

It is, however, less than clear whether, at least for the time being, the position enjoyed by what is now Sky plc within the European media industry, either across the Union as a whole or in individual segments within it, meets the dominance requirement provided in Article 102 TFEU. Sky plc has undoubtedly come to enjoy a central position in the EU, with approximately 20 million customers in total, albeit distributed in markets that remain largely state-based.<sup>133</sup> However, it remains continuously exposed to significant competitive pressure in key areas of the Union, with BT, for instance, threatening its leadership in the UK; Vivendi being rather active across a number of continental areas; and other “new media” companies pushing for access in European markets.<sup>134</sup>

It is concluded that while the market for the supply of “premium media content”—such as live sports programmes—has been shaken by the *Murphy* ruling, the objective characteristics of the industry have so far contributed to forestalling the much feared emergence of pan-European, consolidated media providers whose activities could be detrimental to the plurality of the media, the quality and variety of programmes and consumer choice. While ongoing changes in the structure of the industry may make the national make-up of Sky plc’s subsidiaries more permeable to outside pressure over time, we seem to be still some way away from having to be concerned about the loss of programme originality and the emergence of broadcasters so large and powerful that they prevent the entry and expansion of smaller, perhaps more “territorial”, rivals that can protect cultural diversity.

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<sup>127</sup> Id., para. 41-42.

<sup>128</sup> Id., para. 136-138.

<sup>129</sup> Id., para. 137-138.

<sup>130</sup> See *inter alia* <http://www.theguardian.com/media/2015/apr/21/sky-adds-127000-customers-in-uk-in-third-quarter>, 21 April 2015.

<sup>131</sup> Case T-102/92, *Viho Europe Ltd v Commission*, [1995] ECR II-3, para. 47.

<sup>132</sup> See e.g., *mutatis mutandis* case 27/76, *United Brands Company v Commission*, [1978] ECR 207, especially paras. 157-160.

<sup>133</sup> See Mance, “Sky: all to play for”, 22 December 2014, available at: <http://www.ft.com/cms/s/0/d83a8000-851a-11e4-ab4e-00144feabdc0.html#axzz3bGjB5uqa>.

<sup>134</sup> *Ibid.*

## 5 The future of sports broadcasting in the internal market: where to now? Tentative conclusions

Broadcasting rights to sports events are a lucrative commodity for sports clubs and leagues and for broadcasters throughout the EU. The auction of FAPL licenses in February 2015, for instance, shows just how expensive it can be for media companies to secure the rights to show football matches on Pay-TV platforms. BskyB stumped up just over £5 billion to gain the privilege to do just that over the course of three years, while BT, its next rival, paid around £3 billion.<sup>135</sup> According to Mr Scudamore, at the time chair of the Premier League, this reflected the proven prestige, on domestic and international stages, of the Premier League clubs.<sup>136</sup> Wearing his hat of “shop-steward” of the FAPL clubs (if they and their players ever needed a champion), he observed that such revenues were required not only to fund players’ pay-cheques, so that they would be able to compete with the big European players in a more effective manner, but also to foster a culture of “financially sensible management” and support coaching and other community-based activities, especially for young people.<sup>137</sup>

It is therefore understandable that both the licensors, i.e. the football associations, and the licensees, namely the broadcasters, wish to preserve and exploit as much as possible the economic value of their purchases. In the past, territorial exclusivity clauses affecting the free circulation of broadcasting services provided a tool to maximise these returns.<sup>138</sup> Against this background, the *Murphy* decision was regarded as “throwing a (massive) spanner in the works” of the hitherto tried and tested approach to licensing.

A few years on, it appears that the “ripples” of the decision are not as menacing to licensors as it could have thought at first. As the EU Commission, well-known to be committed to protecting and fostering the internal market, illustrated in its 2014 BskyB merger decision, the market for TV broadcasting rights remains stubbornly “national” in its structure, for reasons that have much to do with linguistic, cultural and generally “objective” constraints and relatively less, it seems, to do with commercial practice. As a result of the objective characteristics of demand, as well as of the products being traded (in turn heavily influenced by the manner of their supply and distribution), the overlap between broadcasters operating in different areas of the internal market was found to be very limited, so that the merger did not give rise to significant concerns for competition within the industry.<sup>139</sup>

In addition, the IP litigation initiated by the FAPL in the UK may over time dissuade at least commercial establishments from relying on the “free movement of decoder devices” to exercise their right to receive services anywhere in the EU, providing that authorisation to use the decoder had been obtained in the state of origin of the signal.<sup>140</sup> However, it cannot be excluded that recourse to justice, as in the cases involving Mr Luxton or Mr Berry, could ultimately lead to a finding that the protection of the integrity of intellectual property rights, openly recognised as worthy of protection in the *Murphy* judgment, imposes in this context a disproportionate restriction on the free movement of services.<sup>141</sup>

It would be equally premature for competition law scrutiny to take a “back seat” while watching how the post-*Murphy* landscape develops. It cannot be excluded that powerful, pan-European broadcasters will not emerge over time as part of a slow trend toward the restructuring of the market,

<sup>135</sup> See inter alia “Premier League in record £5.14 bn. TV rights deal”, 10 February 2015, available at: <http://www.bbc.co.uk/news/business-31379128>.

<sup>136</sup> See Blitz, “Premier League is the big winner from the £5bn TV rights auction”, Financial Times, 11 February 2015, available at: <http://www.ft.com/cms/s/0/0b930d4e-b209-11e4-b380-00144feab7de.html#axzz3bGjB5uqa>.

<sup>137</sup> Ibid.

<sup>138</sup> See inter alia de Vrijes, “Sport, TV and IP rights: Premier League and Karen Murphy”, (2013) 50(2) CMLRev 591, especially pp. 614-615.

<sup>139</sup> See BskyB/Sky Italia/Sky Deutschland, cit. (fn. 120), para. 40-43.

<sup>140</sup> See e.g. Lindholm and Kaburakis, comment on *Murphy*, in Anderson (Ed.), *Leading Cases in Sports Law*. Heidelberg, Germany: TMC Asser Press/Springer-Verlag, pp. 227-241, especially pp. 238-239.

<sup>141</sup> See mutatis mutandis, de Vrijes, cit. (fn. 138), p. 321.

despite its dependency on language and cultural preferences. Ex-post competition scrutiny is thus likely to become increasingly relevant to prevent commercial practices that stretch *Murphy* to its outer limits.<sup>142</sup> Similarly, it cannot be ruled out that the competent authorities may find the application of differentiated fee structures justified by “(...) circumstances falling within its economic and legal context (...)”<sup>143</sup> and in particular by “(...) parameters of the broadcasts concerned, such as their actual audience, their potential audience and the language version (...)”.<sup>144</sup>

It can therefore be concluded that the *Murphy* preliminary ruling has had a more limited impact on commercial practices, at least so far. It is accepted that this is an industry where structural factors remain relatively fluid and where there is an emerging trend, fostered by the EU authorities themselves, toward greater integration.<sup>145</sup> Nevertheless, the responses adopted by broadcasters so far remain broadly consistent with the “natural territorial barriers” that still characterise the market for broadcasting and, more generally, for digital services. The lack of operational overlap on the part of undertakings operating in different linguistic and cultural areas, even when they belong to the same corporate group, and recourse to litigation based on eminently domestic law, such as that arising from allegations of copyright infringement, appear to confirm that the “*Murphy* effect” has been far more contained than previously imagined.<sup>146</sup> However, as the EU Commission steers the Union toward achieving goals of fuller integration within the audio-visual media services’ industry, we could witness policy changes taking shape that could tackle at least some of the problematic consequences associated with the “inevitable” segmentation of this market.

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<sup>142</sup> See e.g. Lindohlm, Kaburakis, Rodenberg, “British pubs, decoder cards and the future of intellectual property licensing after *Murphy*”, (2013) 18 Colum J of Eur Law 307, especially pp. 320-321.

<sup>143</sup> *Murphy*, para. 140.

<sup>144</sup> *Id.*, para. 110. See Lindohlm et al., cit. (fn. 142), p. 321.

<sup>145</sup> See EU Commission Communication: “A digital single market strategy for Europe”, COM (2015) 192 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>, see e.g. p. 7; see also p. 10-11.

<sup>146</sup> See inter alia, mutatis mutandis, Broughton Micova, “Digital Single Market Strategy: implications for audiovisual content”, available at: <http://blogs.lse.ac.uk/mediapolicyproject/2015/05/07/digital-single-market-strategy-implications-for-european-audiovisual-content/>; also Rosati, “Toward an EU wide copyright? (Judicial) pride and (legislative) prejudice”, (2013) IPQ 1 47 at 60-62.